

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MIGUEL P. ROSALES,

Plaintiff,

v.

CIV No. 13-1092 MV/GBW

STATE OF NEW MEXICO, *et al.*,

Defendants.

**ORDER TO EFFECT PROPER SERVICE AND RECOMMENDED DISPOSITION
SHOULD PLAINTIFF NOT COMPLY**

This matter comes before the Court upon Plaintiff's response to the Order to Show Cause. *Docs. 47, 48.* On July 2, 2014, this Court entered an order requiring Plaintiff to show cause as to why his claims against several defendants should not be dismissed "for failure to comply with the service and time provisions of [Federal] Rule [of Civil Procedure] 4(m)." *Doc. 44* at 2.

I. Background

Plaintiff's lawsuit was removed to this Court on November 8, 2013, more than nine months ago. *Doc. 1.* To date, Plaintiff has failed to serve process on a number of the defendants. The Court's July 2, 2014 Order to Show Cause informed Plaintiff that, under Rule 4(m), "[i]f a defendant is not served within 120 days" after removal, "the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). The Order further advised Plaintiff that more than

120 days had elapsed since his action was removed to this Court, making his claims against the unserved defendants subject to dismissal. The Court ordered Plaintiff to show cause by no later than July 16, 2014, as to why his claims against the unserved defendants should not be dismissed without prejudice. *Doc. 44* at 2. Plaintiff responded, albeit more than a week late, on July 24, 2014. *See docs. 47, 48.*

II. Requirements for Service of Process

Federal Rule of Civil Procedure 4(e) sets forth a number of procedures for serving process on a competent adult individual within the United States. This Rule authorizes service by (1) personally delivering the summons and complaint to the individual being served, (2) leaving the summons and complaint at the individual's dwelling house or usual place of abode with someone of suitable age and discretion who resides there, or (3) delivering the summons and complaint to an agent appointed by the individual to receive service. Fed. R. Civ. P. 4(e)(2). Service may also be made pursuant to the waiver provisions of Rule 4(d). "When the plaintiff files a waiver [completed by the defendant], proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver." Fed. R. Civ. P. 4(d)(4). Finally, the Federal Rules provide that a plaintiff may complete service by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made."

Fed. R. Civ. P. 4(e)(1). New Mexico Rule of Civil Procedure 1-004 governs service of process in state court.

III. Discussion

Plaintiff has failed to comply with any of the authorized means of service under state or federal law. In Plaintiff's response to the Court's Order to Show Cause, he asserts that he completed service by sending a copy of the summons and complaint via certified mail to all defendants and requesting a waiver of service. *See generally docs. 47, 48.* He further avers that he has been "acting diligently to rectify the possible error in serving defendants." *Doc. 47* at 2.

Simply mailing a summons and complaint to a defendant, however, is insufficient to effect service on an individual under the Federal Rules of Civil Procedure. Although Plaintiff states that he requested waiver of service via mail pursuant to Rule 4(d), service is not accomplished as to a particular defendant until Plaintiff files that defendant's completed waiver of service. Plaintiff has not done so,¹ perhaps because the individuals he seeks to sue refuse to consent to waive service.² Such would be their right. If Plaintiff has indeed properly requested they waive service pursuant to Rule 4(d)(1), Defendants may be required to reimburse the expense of

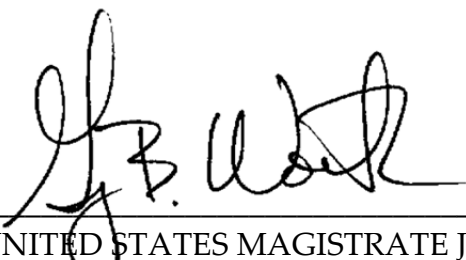
¹ Similarly, Plaintiff has not filed or presented any evidence of a receipt signed by any defendant acknowledging service of the summons and complaint which is required under the state rule governing service. *See* Rule 1-004(E)(3) NMRA.

² Plaintiff does submit what appears to be a completed waiver of service from Guadalupe Rosales (*doc. 37*), but this individual is not a named defendant, nor is he mentioned anywhere within Plaintiff's complaint.

service. *See* Fed. R. Civ. P. 4(d)(2). But Plaintiff must first serve them properly. He has not done so, nor has he demonstrated good cause to excuse his failure.

IV. Conclusion

This case was removed to federal court on November 8, 2013. *See doc. 1*. More than nine months later, only Defendants State of New Mexico, Adult Protective Services, District Attorney's Office, City of Alamogordo, and Karen Duprey have been served. Plaintiff has been advised in the Order to Show Cause, and is hereby advised again, that he has failed to properly serve the remaining defendants. *See doc. 44*. He has also been advised that this failure subjects the claims against those defendants to dismissal without prejudice. *Id.* Therefore, pursuant to Rule 4(m), Plaintiff is hereby ORDERED to effect proper service on all defendants not listed above within seventeen (17) days of this filing. Should Plaintiff fail to do so, I hereby RECOMMEND that all defendants which remain unserved be dismissed from this action without prejudice.



UNITED STATES MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of this Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**